Supreme Court, U.S.
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No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1998, after the Federal Deposit Insurance Corporation announced its policy decision to refrain from invoking the common-law rule of *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), in post-1989 litigation, this Court declined to review the Eleventh Circuit's decision in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). At that time, there existed the very same inter-Circuit conflict that is urged upon the Court by petitioner in his attempt to secure review of the Eleventh Circuit's decision in this case. The Eleventh Circuit's unremarkable application of its own precedent presents no issue for review by this Court that was not presented in 1998, and the need for resolution of this relatively-minor doctrinal dispute among some of the Circuits has, if anything, significantly lessened over time.

The question presented is:

Whether, in the absence of express congressional intent, the common-law *D'Oench* doctrine was abrogated by 12 U.S.C. §§ 1821(d)(9) and 1823(e), as adopted in 1989.

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The Respondent, Jeffrey H. Beck, as successor agent for Southeast Bank, N.A., respectfully requests this Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Eleventh Circuit, attached as Appendix A to the Petition, is reported at 208 F.3d 959 (11th Cir. 2000). The opinion of the district court, attached as Appendix F, is unreported.

STATEMENT OF JURISDICTION

Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner has reproduced the pertinent statutory provisions, 12 U.S.C. §§ 1821(d)(9) and 1823(e), in his Appendix G and Appendix H.

STATEMENT OF THE CASE

Petitioner Murphy instituted an action in the United States District Court for the District of Columbia against the FDIC, as receiver for Southeast Bank, in August 1992, alleging that Southeast had served as the lender for a development in Indian River County, Florida, and had participated in fraudulent activities by the developer's principals. Appendix A at 2-3. On the FDIC's motion, the district court dismissed Murphy's claims under the *D'Oench* doctrine. *Id.* at 3. On Murphy's appeal, the Court of Appeals for the D.C. Circuit reversed (on all but two counts of the

complaint), holding that the *D'Oench* doctrine had been preempted by the 1989 adoption of 12 U.S.C. § 1821(d)(9). *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995). Appendix A at 3-4.

Following the D.C. Circuit's remand, the district court, on its own motion, transferred Murphy's action to the Southern District of Florida. Appendix A at 4. The district court in Florida dismissed Murphy's complaint on three independent bases, one of which was that Murphy's claims are barred under the *D'Oench* doctrine. *Id.*

On appeal, the Eleventh Circuit determined that it should apply its own precedent and rejected Murphy's claim of entitlement to the ruling by the D.C. Circuit. Appendix A at 7-11. The court also rejected Murphy's argument that *D'Oench* should not be applied because a surplus existed in the FDIC's receivership. *Id.* at 13. The court then declined to reconsider its prior *en banc* holding that the *D'Oench* doctrine has *not* been supplanted by 12 U.S.C. §§ 1821(d)(9) and 1823(e). Appendix A at 15-18.

REASONS FOR DENYING THE WRIT

For almost 60 years, the common-law rule of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), has peacefully coexisted with statutes governing the various federal agencies that have enforced the banking laws. Neither in 1950, when the Congress partially codified *D'Oench* in the original version of 12 U.S.C. § 1823(e), nor in 1989, when — in response to a national crisis in the savings and loan industry — the Congress enacted the Financial Institution's Reform, Recover, and Enhancement Act (FIRREA), did the Congress even intimate that the *D'Oench* doctrine was being supplanted by statutory law. Nonetheless, by 1997, a split of authority had developed among three Circuits, with the

D.C. Circuit stating for the first time in *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995) that *D'Oench* had been preempted by FIRREA, and the Eleventh Circuit holding on the other hand that *D'Oench* survived FIRREA because, under the governing principles of *United States v. Texas*, 507 U.S. 529 (1993), the Congress could not be deemed to have silently discarded the doctrine. *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (*en banc*), *vacated and remanded*, 519 U.S. 1087 (1997), *on remand*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998).

In light of this Court's decision in *Atherton v. FDIC*, 519 U.S. 213 (1997), the Court remanded the Eleventh Circuit's *Motorcity* decision for further consideration in light of the *Atherton* holding. *Hess v. FDIC*, 519 U.S. 1087 (1997). On remand, the Eleventh Circuit reaffirmed its holding that *D'Oench* survives FIRREA, and this Court declined to review that decision. *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140, 1142-44 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). Nothing has happened since that denial of review in *Motorcity* to warrant review by this Court now.

The decision presently brought for review merely applies the court's *Motorcity* precedent, and this Court's previous denial of alleged conflict review.[1] If anything, the passage

1. The happenstance that Bruce G. Murphy was the prevailing party before the D.C. Circuit and the losing party before the Eleventh Circuit, while ironic, is of absolutely no moment. As reflected in the Eleventh Circuit's opinion — and *never* challenged by Murphy before that court — the District of Columbia District Court transferred the case to the Southern District of Florida because Murphy's claims arose in Florida. Appendix A at 2-4. Simply stated, Murphy's case should have been before a district court within the jurisdiction of the Eleventh Circuit in the first instance.

of time since *Motorcity II*, and the FDIC's decision announced shortly after the remand order in *Motorcity* that the FDIC will not assert the *D'Oench* doctrine in post-1989 litigation, have served to further minimize the import of the minor doctrinal conflict among the circuits.

I.

THE BACKGROUND OF THE ASSERTED INTER-CIRCUIT CONFLICT.

Four years after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), this court announced in *D'Oench* the common-law principle that "side agreements" between a bank and its customers may not be invoked against the FDIC following the takeover of a failed bank. 315 U.S. at 455-60. The rule created in *D'Oench* was intended to protect the FDIC "and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks." *Id.* at 457. Eight years later, the Congress partially codified the *D'Oench* doctrine by enacting the following language in 12 U.S.C. § 1823(e)(1) (1950):

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder . . . , (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Id.

There are important distinctions between the common-law doctrine and the 1950 version of Section 1823(e), most notably that the statute did not apply to the FDIC acting as a receiver and did not apply to the former Federal Savings & Loan Insurance Corporation. The legislative history of Section 1823(e), however, reflected no Congressional intention to displace or supplant the *D'Oench* doctrine. *FDIC v. McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (noting the absence of any mention of *D'Oench* in the legislative history of the 1950 amendment and concluding that "there is no reason to suppose that Congress intended to forbid the rule of estoppel from being applied" in extra-statutory contexts). As the Eleventh Circuit noted in the original *Motorcity* decision, following the enactment of Section 1823(e) the federal courts looked to the *D'Oench* doctrine in instances in which the statutory language did not pertain, ultimately developing a common-law principle that a private party may not enforce a secret agreement against a federal deposit insurer. *Motorcity I*, 83 F.3d at 1325-26 (citation omitted). In this Court's only decision addressing Section 1823, the Court recognized the unique relationship between *D'Oench* and the statute and, indeed, looked to *D'Oench* to support its construction of Section 1823(e) as applying to "agreements" beyond only those constituting "promises to perform acts in the future." *Langley v. FDIC*, 484 U.S. 86, 92 (1987).

Thus, for over 30 years the federal courts applied Section 1823(e) and the *D'Oench* doctrine "as two overlapping tools available to the FDIC when it seeks to recover funds due upon notes it has acquired after a bank fails." John B. Shumadine, *Striking a Balance: Statutory Displacement of Established Federal Common Law and the D'Oench Doctrine in Murphy v. F.D.I.C. and Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 51 ME. L. REV. 129, 144 (1999) (hereinafter *Striking a Balance*).

The potentially-disastrous savings and loan crisis that came to light in 1988 and impelled the Congress to enact FIRREA is well-documented. H.R. REP. NO. 101-54 [I], at 302-07 (1989), *reprinted in* 1989 U.S.C.C.A.N. 87. FIRREA was intended by the Congress to provide the FDIC with the "power to take all actions necessary to resolve the problems posed by a financial institution in default." *Id.* at 330. To that end, Section 1823(e) was extended to the FDIC acting as a receiver (12 U.S.C. § 1823(e), *see* Appendix G), to the newly-created Resolution Trust Corporation in both receivership and corporate capacities (12 U.S.C. § 1441a(b)(4)(A)), and to bridge banks. 12 U.S.C. § 1821(n)(4)(I). Congress also adopted 12 U.S.C. § 1821(d)(9)(A) to shield the FDIC from claims based upon agreements that do not satisfy Section 1823(e). (*See* Appendix H).

Once again, however, Congress voiced no intention to displace or supplant the *D'Oench* doctrine despite an expansion of the statutory reach. *Striking a Balance*, *supra* at 150 ("There is no affirmative indication that FIRREA was intended to displace the *D'Oench* common law rule.") (footnote omitted). The simultaneous amendment of Section 1823(e) in connection with the adoption of Section

1821(d)(9)(A) evince an intent "to protect the FDIC and to minimize future losses" by expanding the protection given the FDIC when it acquires assets following a bank failure. *Id.* at 151 n.158. While *D'Oench* and the statutory provisions are often construed "in tandem . . . the common-law doctrine and the statute remain separate and independent grounds for decision." *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir.), *cert. denied*, 522 U.S. 928 (1997).

The D.C. Circuit's decision in *Murphy v. FDIC*, holding that *D'Oench* nonetheless has been supplanted by FIRREA, reflects the court's perception of a departure in this Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) from the pre-1989 co-existence between *D'Oench* and statutory law. This Court's silence in *O'Melveny* on the subject of the *D'Oench* doctrine notwithstanding, the D.C. Circuit determined that "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute — of which the *D'Oench* doctrine is one." *Murphy v. FDIC*, 61 F.3d at 39. The Eighth Circuit, in *DiVall Insured Income Fund Limited Partnership v. Boatmen's First National Bank of Kansas City*, 69 F.3d 1398 (8th Cir. 1995), ruled to the same effect. *Id.* at 1402.

In its first *en banc* decision in the *Motorcity* litigation, the Eleventh Circuit faulted the D.C. Circuit and the Eighth Circuit for applying *O'Melveny* outside of its proper context. As the court noted, *O'Melveny* addressed "whether the federal courts should create a *new* federal common-law doctrine in an area in which Congress had not expressed any special concern, nor indicated that a special federal rule of decision should govern." 83 F.3d at 1330 (emphasis added; footnote omitted). Instead, the Eleventh Circuit looked to

this Court's decision in *United States v. Texas*, 507 U.S. 529 (1993) — a decision never mentioned or addressed by the D.C. Circuit and the Eighth Circuit — to guide it in determining the *actual* question presented, *i.e.*, whether a *pre-existing* rule of federal common law will survive a statutory enactment which moves partially in the same field. 83 F.3d at 1330-31. Noting that FIRREA does not "comprehensively address the substance of the federal common law *D'Oench* doctrine," that the Congress instead had carried over the statutory language originally enacted in 1950, and that "when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute," the Eleventh Circuit concluded that "Congress did not intend to preempt the prior federal common law *D'Oench* doctrine." *Id.* at 1332-33. The Fourth Circuit adopted the Eleventh Circuit's holding. *Young v. FDIC*, 103 F.3d at 1187.

In this Court's *Atherton* decision, the Court held that the common-law standards enunciated in *Briggs v. Spaulding*, 141 U.S. 132 (1891), governing federally chartered banks did not survive *Erie*, and that the prior, federal common law standard was displaced by the elimination of federal common law in *Erie*. 519 U.S. at 224-31. Following this Court's remand in *Motorcity*, the Eleventh Circuit noted the disparity between that situation and FIRREA's possible impact on *D'Oench* to hold that "*Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine." *Motorcity II*, 120 F.3d at 1143 (footnote omitted). Again relying on *United States v. Texas*, the Eleventh Circuit held that "the most reasonable reading

of Congress's intent [is] that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year co-existence of the statute and the *D'Oench* doctrine." *Id.* at 1144. Significantly, fully aware of *Atherton*, *Murphy*, *DiVall* and *Young*, the Court declined to review the second *Motorcity* decision.

II.

PETITIONER PRESENTS NO CASE FOR REVIEW BY THIS COURT.

It is not every conflict of decisions among the circuits that warrants a grant of certiorari in this Court. U.S. Sup. Ct. R. 10(a). The doctrinal differences among the Circuits that have taken varying courses post-FIRREA on the survival of *D'Oench* notwithstanding, the *actual* consequences are minimal at best. As the relative paucity of recent decisions on this issue indicates, a number of factors have coalesced to render the conflict all but moot. First, the FDIC — the entity for which the *D'Oench* doctrine was created and for which Sections 1823(e) and 1821(d)(9) were enacted — has announced a policy of non-reliance on *D'Oench* for post-1989 cases:

> In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent that such claims would be barred by the *D'Oench* doctrine.
>
> * * *

> Accordingly, . . . the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into *after* the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). . . .

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depositor Institution Prior to Receivership, 62 Fed. Reg. 5984, 5985 (Feb. 10, 1997) (emphasis added).[2]

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2. While Murphy impugns the FDIC's policy statement as "legally meaningless" implying that the FDIC will not adhere to its declared policy, Petition at 15 & n.11, the authority cited by Murphy, by his own admission, shows precisely the contrary. That is, the precedent shows that the FDIC is applying *D'Oench* to *pre-FIRREA* cases. *Id.* at 13-15. The only purportedly-contrary precedent cited by Murphy, *FDIC v. Boone (In Re Boone)*, 235 B.R. 828 (Bankr. D.S.C. 1998), Petition at 15, reveals itself upon close examination to be no indicium of the FDIC's alleged disregard of its policy. Rather, the bankruptcy court in that case — which lies within a Circuit that regards *D'Oench* as having survived FIRREA, *see Young v. FDIC*, 103 F.3d at 1187 — treated the common-law *D'Oench* doctrine and Section 1823(e) as *co-extensive* and ultimately *rejected* the FDIC's position. 235 B.R. at 835 & n.11 and 836-37. The FDIC appears faithfully to be following the policy statement. *E.g.*, *Point*

(Cont'd)

To be sure, successors, transferees, and assignees of the FDIC (and its predecessors) have been permitted to invoke the *D'Oench* doctrine in the FDIC's stead. *E.g.*, *Motorcity I*, 83 F.3d at 1325; *Newton v. Uniwest Financial Corp.*, 967 F.2d 340, 346 (9th Cir. 1992). Post-FIRREA, the Eleventh Circuit has held that the same rule obtains, *First Union National Bank of Florida v. Hall*, 123 F.3d 1374, 1379 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1135 (1998), the Fourth Circuit has suggested that assignees are within the scope of Section 1823(e), *Federal Financial Co. v. Hall*, 108 F.3d 46, 49-50 (4th Cir.), *cert. denied*, 522 U.S. 858 (1997), and the Eight Circuit (after having adopted the D.C. Circuit's *Murphy* rationale) declined to reach the question whether successors are entitled to protection under Section 1823(e) and tolerated the district court's ruling that the statute applies to successors. *Kessler v. National Enterprises, Inc.*, 165 F.3d 596, 599 n.2 (8th Cir. 1999). The First Circuit, which had elected not to address the question whether *D'Oench* survives as common-law doctrine independent of FIRREA, *e.g.*, *FDIC v. Houde*, 90 F.3d 600, 605 n.5 (1st Cir. 1996), treats Section 1823 and *D'Oench* as a single doctrine and has heard *D'Oench* claims raised by an assignee of the FDIC, albeit without addressing the question. *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68-69 (1st Cir. 1999). Until such time as the Circuits' views on the question whether Section 1823(e) may be invoked by the successors and assigns of the FDIC coalesces or develops into a recognizable split of authority, the right of successors such as respondent to invoke *D'Oench* presents no compelling basis for addressing the existing disparate views.

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Developers, Inc. v. FDIC, 961 F. Supp. 449, 458 (E.D.N.Y. 1997) (noting that the FDIC "invokes only sections 1821(d)(9)(A) and 1823(e) in support of its motion, not the common law *D'Oench, Duhme* doctrine").

History has demonstrated the wisdom of this Court's disinterest in this conflict when it was first placed squarely before the Court by *Motorcity II*. The question of the *D'Oench* doctrine's survival has not much occupied the attention of the courts of appeal since this Court's denial of certiorari in *Motorcity II*. The First Circuit, as previously noted, has declined to address the issue thus far, as has the Tenth Circuit in *FDIC v. Noel*, 177 F.3d 911, 918 n.5 (10th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 935 (2000). The Ninth Circuit has taken as a "given" that *D'Oench* remains vital while declining to apply the doctrine in the particular situation where the FDIC acts as a receiver and "merely stands in the shoes of the insolvent bank." *Ledo Financial Corporation v. Summers*, 122 F.3d 825, 829 & n.2 (9th Cir. 1997). Only the Third Circuit has firmly committed to the rationale of *Murphy v. FDIC*, although without consideration of the Court's denial of certiorari in *Motorcity II*. *FDIC v. Deglau*, 207 F.3d 153, 170 (3d Cir. 2000).[3] Even the D.C. Circuit has not had occasion to apply its rejection of *D'Oench* as a viable common law doctrine. *Striking a Balance*, *supra* at 157 & n.213.[4]

3. The *Deglau* decision issued on March 13, 2000, long after the issuance by the Eleventh Circuit of *Motorcity II* and this Court's denial of certiorari. Nonetheless the Third Circuit looked only to this Court's decision in *Hess v. FDIC* (which vacated and remanded *Motorcity I* for reconsideration in light of *Atherton v. FDIC*), to discount *Motorcity* as viable precedent. *Deglau*, 207 F.3d at 170. Moreover, the Third Circuit treated the Ninth Circuit's decision in *Ledo* as holding that "*D'Oench* is not applicable federal common law," 207 F.3d at 170, when, as has been explained above, that is simply an inaccurate characterization of *Ledo*.

4. It probably was not even necessary for the D.C. Circuit to have reached the question whether *D'Oench* survived FIRREA in order to dispose of Mr. Murphy's case. Section 1823(e) pertains to (Cont'd)

In the end, it is readily seen that Murphy has overstated the import of what is nothing more than a minor doctrinal conflict among the circuits. It is simply counterintuitive to suggest that a great many cases arising from *pre*-1989 claims are being brought — or, in light of limitations considerations, will be brought. The FDIC's decision to rely solely on the FIRREA statutes in post-1989 claims takes much of the force out of Murphy's argument. The narrower question of whether successors or assigns of the FDIC may invoke *D'Oench* is far too minor at the present time to warrant consideration of the overarching doctrinal issue.

The only interstice at which the differing views of the Eleventh Circuit and the D.C. Circuit bisect is when a party's defense or claim is unrelated to a "specific asset," *and* the

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identified assets held by the FDIC, and the statute bars certain defenses to the FDIC's collection on such assets. 12 U.S.C. § 1823(e). Section 1821(d)(9)(A) operates as a bar to *an affirmative claim against the FDIC*, like Murphy's claim, when such a claim fails to satisfy the requirements of Section 1823(e). 12 U.S.C. § 1821(d)(9)(A). In other words, Section 1823(e) bars the advancement of those *defenses* that fail to satisfy its provisions, and Section 1821(d)(9)(A) incorporates the requirements of 1823(e) so that they operate to bar those affirmative *claims* that fail to satisfy the requirements of Section 1823(e). Murphy's claim was governed by Section 1821(d)(9)(A), and, by operation of that Section, subject to the requirements of Section 1823(e). One of the requirements of Section 1823(e) is that the agreement forming the basis of a defense or claim concern an identified "asset acquired by" the FDIC. 12 U.S.C. § 1823(e). The very fact on which the DC Circuit's decision turned, *i.e.*, that Murphy's claim did not involve a "specific asset" acquired by the FDIC — should have compelled a ruling under Section 1821(d)(9)(A) in the FDIC's favor without the necessity of addressing whether *D'Oench* retains its vitality.

FDIC is out of the picture by virtue of a succession, transfer or assignment. The universe of cases in which varying results *might* be reached — depending upon a particular circuit's view on the question whether *D'Oench* survives — is miniscule, if not virtually non-existent. This Court's denial of certiorari here, coming on the heels of the Court's denial of certiorari in *Motorcity II*, should provide guidance enough in the limited area where the issue of *D'Oench* viability may surface in the future.

CONCLUSION

Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

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